IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.50 OF 2005

Ms. Pillo Dadabhoy Broacha & Ors. ... Petitioners

Vs.

Daulat Jehangir Mehta ... Respondent

Mr. R.D. Dave i/b M/s. N.N. Vaishnawa & Co. for the petitioners.

Mr. Sunil Jaykar for the respondent.

CORAM: SMT. RANJANA DESAI, J.

DATED: 18TH JANUARY, 2005.

P.C.:-

1. The petitioners (original defendants) have challenged in this court orders dated 20/12/2004 and 22/12/2004 passed by the Small Causes Court at Bombay on Interim Notice No.5739 of 2004 in R.A.D. No.202 of 2004. By judgment and order dated 6/9/2004 passed in Writ Petition No.7279 of 2004 filed by the respondent-plaintiff Justice R.M.S. Khandeparkar has directed the trial court to record the statement of the plaintiff as well as cross-examination and the re-examination, if any, as expeditiously as possible and without waiting for the suit to reach the stage of recording of evidence. It appears that pursuant to this order, the trial court has taken on record the plaintiff's examination-in-chief on affidavit. In this petition, a grievance is made that the said affidavit travels beyond the scope of the plaint.

2. I have heard the learned counsel appearing for the petitioner. He contended that the defendants have filed their written statements and issues have also been framed. So far as this aspect is concerned, it is reflected in Justice Khandeparkar's order that he has considered this aspect. He has quoted with approval the decision of the Patna High Court in **Ram Prasad & Anr. v. Ram Sewak Lal & Anr. AIR 1978 Patna 218**, wherein the Patna High Court has held after considering Rule 16 of Order 18 of the Code of Civil Procedure, that in appropriate facts and circumstances, the application may be moved by the plaintiff even where the defendant has not filed his written statement and issues have not been framed.

3. In view of this, the contention of the petitioners that issues have not been framed and, therefore, such examination-in-chief on affidavit could not have been taken has no substance. So far as the contention of the petitioners that the affidavit travels beyond the scope of the plaint is concerned, I feel that if in fact that is so and in fact if the petitioners are prejudiced thereby, the petitioners are justified in making this grievance. The trial court shall at the appropriate stage, consider this grievance of the petitioners and pass its order after applying its mind to this aspect of the matter. Besides, I find from the order dated 22/12/2004 passed by the learned trial judge that he has considered the admissibility of each and every document

and, only thereafter, he has exhibited them. That order is not challenged. In view of this, I find no substance in this petition.

4. Petition is disposed of in the aforestated terms.

(SMT. RANJANA DESAI, J.)